
SIXTH AMENDMENT — WITNESS CONFRONTATION — SUPREME COURT OF CALIFORNIA ADMITS BLOOD ALCOHOL CONCENTRATION TEST RESULTS OVER CONFRONTATION CLAUSE CHALLENGE. — *People v. Lopez*, 286 P.3d 469 (Cal. 2012), *cert. denied*, 133 S. Ct. 1501 (2013).

In the 2004 case of *Crawford v. Washington*,¹ the Supreme Court dramatically altered its interpretation of the Sixth Amendment's Confrontation Clause, overruling *Ohio v. Roberts*² and barring the admission of "testimonial" out-of-court statements in criminal trials.³ While many observers celebrated the decision,⁴ courts have since grappled with the question of which statements qualify as "testimonial."⁵ Recently, in *People v. Lopez*,⁶ the Supreme Court of California attempted to clarify this unsettled area of law by articulating a two-pronged inquiry that looks to both the formality and the primary purpose of an out-of-court statement to determine if it is testimonial. Under this two-pronged approach, the court found the forensic evidence at issue in the case to be insufficiently formal to qualify as testimonial, and thus held that its admission at trial did not violate the defendant's Confrontation Clause rights. While the *Lopez* court was correct to note that both formality and purpose are important considerations in determining whether a statement is testimonial, a better approach would have been to articulate a singular primary-purpose inquiry that treats formality as just one important indication of that purpose. Such an approach would have been both more faithful to the Supreme Court's Confrontation Clause jurisprudence and analytically preferable in confronting the unique Sixth Amendment hurdles that forensic evidence presents.

¹ 541 U.S. 36 (2004).

² 448 U.S. 56 (1980). Under *Roberts*, an out-of-court statement was admissible under the Confrontation Clause only if it bore "indicia of reliability," *id.* at 66 (quoting *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (internal quotation marks omitted)), which could be shown by demonstrating either that the statement fell within "a firmly rooted hearsay exception" or that it had "a showing of particularized guarantees of trustworthiness," *id.*

³ *Crawford*, 541 U.S. at 53–54. Under *Crawford*, there is an exception for testimonial statements made by a declarant who is "unavailable to testify, [when] the defendant had a prior opportunity for cross-examination." *Id.* at 54.

⁴ See generally Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865 (2012); Stephanos Bibas, Essay, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005). For an overview of the legal and editorial reaction to *Crawford*, see Robert M. Pitler, *Introduction to Symposium: Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1, 12–14 (2005).

⁵ See generally Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241 (2005); Dylan O. Keenan, Note, *Confronting Crawford v. Washington in the Lower Courts*, 122 YALE L.J. 782 (2012).

⁶ 286 P.3d 469 (Cal. 2012), *cert. denied*, 133 S. Ct. 1501 (2013).

In 2009, five years after the *Crawford* Court expressly reserved the question of which out-of-court statements qualify as “testimonial” under the Confrontation Clause,⁷ the Court raised the stakes of that debate with its holding in *Melendez-Diaz v. Massachusetts*,⁸ which extended *Crawford*’s reach to forensic evidence by barring the admission at trial of “testimonial” lab reports prepared by out-of-court analysts.⁹ Although this holding was consistent with the Court’s newly developed purpose-driven approach to confrontation,¹⁰ the holding in *Melendez-Diaz* has since forced the Court to confront pragmatic concerns regarding the exclusion of highly probative scientific data.¹¹ Those competing interests culminated in last Term’s *Williams v. Illinois*,¹² which generated three distinct Confrontation Clause approaches, none of which managed to garner majority support.¹³ Last October, the Supreme Court of California had the opportunity to address this muddled area of constitutional law in *Lopez*.

In August 2007, while driving under the influence of alcohol, Virginia Lopez lost control of her vehicle and struck the driver’s side of a passing pickup truck, killing the driver inside.¹⁴ Approximately

⁷ See *Crawford*, 541 U.S. at 68.

⁸ 129 S. Ct. 2527 (2009).

⁹ *Id.* at 2532 (“[U]nder our decision in *Crawford* the analysts’ affidavits were testimonial statements . . . [Therefore], petitioner was entitled to ‘be confronted with’ the analysts at trial.” (quoting *Crawford*, 541 U.S. at 54)). Two years later, in the case of *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), the Court extended the reach of *Melendez-Diaz* by holding that prosecutors cannot satisfy the Confrontation Clause through the use of “an in-court substitute witness for the analyst” who prepared the report at issue. Ronald J. Coleman & Paul F. Rothstein, *Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used Bullcoming v. New Mexico to Clarify Confrontation Clause Requirements for CSI-Type Reports*, 90 NEB. L. REV. 502, 505 (2011); see also *id.* at 524.

¹⁰ Though the Court has not reached a consensus on the precise definition of “testimonial,” in determining whether out-of-court statements qualify as testimony, the Court has consistently looked to whether the purpose of those statements is to facilitate criminal prosecution. See, e.g., *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (holding that a statement “is not within the scope of the [Confrontation] Clause” if “its purpose is not to create a record for trial”); *Melendez-Diaz*, 129 S. Ct. at 2539–40 (holding that statements are not testimonial if they do not have “the purpose of establishing or proving some fact at trial,” *id.* at 2540); *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that statements are testimonial when their “primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution”).

¹¹ See, e.g., *Williams v. Illinois*, 132 S. Ct. 2221, 2246 (2012) (Breyer, J., concurring) (“[T]here would seem often to be no logical stopping place between requiring the prosecution to call as a witness one of the laboratory experts who worked on the matter and requiring the prosecution to call *all* of the laboratory experts who did so.”); *Melendez-Diaz*, 129 S. Ct. at 2544 (Kennedy, J., dissenting) (arguing that the extension of *Crawford* to forensic testing “has vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence”).

¹² 132 S. Ct. 2221.

¹³ See generally *The Supreme Court, 2012 Term — Leading Cases*, 126 HARV. L. REV. 176, 266–76 (2012).

¹⁴ *Lopez*, 286 P.3d at 471–72.

two hours after the accident, hospital staff drew two vials of Lopez's blood for blood alcohol testing, which confirmed that she had a blood alcohol content of 0.09%.¹⁵ Lopez was charged with vehicular manslaughter while intoxicated,¹⁶ but the technician who conducted her blood alcohol analysis, Jorge Peña, did not testify at her jury trial.¹⁷ Instead, a colleague of Peña's testified in his place and, over Lopez's objection, stated that Peña's report confirmed a blood alcohol concentration of 0.09% and that his "separate abilities as a criminal analyst" led him to the same conclusion.¹⁸ Based on that testimony, Lopez was convicted and sentenced to two years in prison.¹⁹

The California Court of Appeal affirmed Lopez's conviction, finding that Peña produced his report "in the course of a regularly conducted business activity rather than as testimony in preparation for trial" and therefore that the report was not a testimonial statement triggering the protections of the Confrontation Clause.²⁰ Six weeks after that decision, however, the U.S. Supreme Court handed down its decision in *Melendez-Diaz* and, in light of that decision, the Supreme Court of California granted Lopez's petition for review and transferred her case back to the Court of Appeal for reconsideration.²¹ Upon reconsideration, the Court of Appeal found the blood alcohol reports at issue in Lopez's case to be indistinguishable from the certificates in *Melendez-Diaz* and therefore held that their introduction at trial violated the Confrontation Clause.²² Accordingly, the Court of Appeal overturned Lopez's conviction.²³

The Supreme Court of California reversed. Writing for the court, Justice Kennard²⁴ began by recounting the three instances in which the U.S. Supreme Court had applied the holding of *Crawford* "to documents reporting the laboratory findings of nontestifying analysts."²⁵ From the admittedly imprecise holdings of those cases, Justice Kennard gleaned a two-factor test for determining when such documents are "testimonial": first, "the out-of-court statement must have been made with some degree of formality or solemnity," and

¹⁵ *Id.* at 472.

¹⁶ *Id.* n.1.

¹⁷ *Id.* at 472.

¹⁸ *Id.* (internal quotation marks omitted).

¹⁹ *Id.* at 473.

²⁰ *People v. Lopez*, No. D052885, 2009 WL 1280867, at *2 (Cal. Ct. App. May 11, 2009).

²¹ *Lopez*, 286 P.3d at 473.

²² *People v. Lopez*, 98 Cal. Rptr. 3d 825, 829 (Ct. App. 2009).

²³ *Id.*

²⁴ Justice Kennard was joined by Chief Justice Cantil-Sakauye and Justices Baxter, Werdegar, and Chin.

²⁵ *Lopez*, 286 P.3d at 474; *see id.* at 474-75 (reviewing the facts and holdings of *Melendez-Diaz*, *Bullcoming*, and *Williams*).

second, “its primary purpose [must] pertain[] in some fashion to a criminal prosecution.”²⁶ Turning to the laboratory report at issue in *Lopez*, Justice Kennard concluded that the court did not need to analyze the second factor because “the critical portions of [Peña’s] report were not made with the requisite degree of formality or solemnity to be considered testimonial.”²⁷ Rather, the court held, the report was merely an informal record for internal purposes, and therefore its introduction at trial did not implicate the Confrontation Clause.

Justice Corrigan concurred.²⁸ Although she agreed with the majority’s reasoning, she would have grounded the court’s analysis in the second, primary-purpose prong of the majority’s testimony inquiry. Relying on dicta in *Melendez-Diaz*,²⁹ Justice Corrigan found most of Peña’s report to be clearly nontestimonial, as its primary purpose was “for the administration of [the] entity’s affairs,” rather than to keep a record for later use at trial.³⁰ Regarding those portions of the report that were “arguably more testimonial in character” — including a notation verifying the blood sample’s sealed condition and another linking the analysis machine’s 0.09% reading to the defendant’s sample number — Justice Corrigan found their admission to be harmless error, regardless of the primary purpose behind their creation, and therefore found no Confrontation Clause violation.³¹

Justice Liu dissented. Criticizing the court for failing to address the purpose prong of the testimony inquiry, he would have looked to both formality and purpose, finding the report at issue to be testimonial under both. Regarding formality, Justice Liu would have focused on the formality of the *process* by which the out-of-court statement was made, rather than on the formality of the *format* of the statement itself.³² Because “the highly proceduralized, government-driven charac-

²⁶ *Id.* at 477.

²⁷ *Id.* In making this determination, the court relied primarily on the fact that neither Peña nor the laboratory assistant who had initially recorded Lopez’s name and laboratory number had “signed, certified, or swor[n] to the truth of the contents . . . of the report,” as well as the fact that Peña labeled the report as being “FOR LAB USE ONLY.” *Id.* at 479.

²⁸ Justice Corrigan was joined by Justices Baxter, Werdegar, and Chin. Justice Werdegar also filed a concurrence, writing separately to echo Justice Breyer’s pragmatic concurrence in *Williams* and to stress the need to “continue the search for a workable rule,” *id.* at 480 (Werdegar, J., concurring), that would create “a fair and practical ‘*Crawford* boundary’” in cases of forensic evidence, *id.* (quoting *Williams v. Illinois*, 132 S. Ct. 2221, 2248 (2012) (Breyer, J., concurring)). Justice Werdegar was joined by Chief Justice Cantil-Sakauye and Justices Baxter and Chin.

²⁹ In extending the holding of *Crawford* to forensic test reports, Justice Scalia qualified his opinion by noting that business records will generally be nontestimonial, “having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial.” *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539–40 (2009).

³⁰ *Lopez*, 286 P.3d at 482 (Corrigan, J., concurring) (quoting *Melendez-Diaz*, 129 S. Ct. at 2539) (internal quotation marks omitted).

³¹ *Id.* at 482; *see id.* at 482–83.

³² *Id.* at 488 (Liu, J., dissenting).

ter of [Lopez's] blood alcohol analysis is apparent," he would have found the reports to be sufficiently formal to implicate Lopez's Confrontation Clause rights.³³ Turning to the second prong of the testimony inquiry, Justice Liu concluded that "from the moment [Lopez's] evidence bag [was] opened . . . the lab's procedures [were] driven by potential use of the results as evidence in a criminal prosecution"³⁴ and therefore that the primary-purpose prong was satisfied as well.³⁵

Though the *Lopez* court rightly identified both formality and purpose as important considerations in determining whether a statement is "testimonial," the court should not have held formality to be a necessary characteristic of testimonial statements. Instead, the *Lopez* court should have articulated a singular primary-purpose approach, treating formality as an important but not a necessary indication of that purpose. This path would have better accommodated both Supreme Court doctrine and the emerging Sixth Amendment challenges that forensic evidence raises.

The majority was certainly correct to observe that the Supreme Court has placed a great deal of emphasis on the formality of out-of-court statements in determining whether they are "testimonial."³⁶ But it would be a mistake to infer from that emphasis that formality is a *necessary* characteristic of a testimonial statement under the Confrontation Clause.³⁷ As Justice Liu recognized in his dissent, the Court has never placed dispositive weight on the formality of an out-of-court statement in determining whether it is testimonial. In *Michigan v. Bryant*,³⁸ the Court made the relationship between formality and purpose explicit: "Formality is not the sole touchstone of our *primary purpose inquiry* because . . . informality *does not necessarily indicate* . . . the lack of testimonial intent."³⁹ In fact, Justice Thomas is the

³³ *Id.* at 489.

³⁴ *Id.* at 491–92.

³⁵ *Id.* at 492.

³⁶ See, e.g., *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012) (plurality opinion) ("The abuses that the Court has identified as prompting the adoption of the Confrontation Clause . . . involved formalized statements such as affidavits, depositions, prior testimony, or confessions.")

³⁷ While the Court has gone so far as to say that "formality is indeed essential to testimonial utterance," *Davis v. Washington*, 547 U.S. 813, 831 n.5 (2006), that statement was dictum from a relatively early post-*Crawford* case and was made in response to Justice Thomas's argument that formality should be the dispositive consideration in determining whether a statement is testimonial, see *id.* at 830 n.5. That the *Davis* Court rejected Justice Thomas's formality-based approach while nevertheless recognizing formality's importance supports the view that formality is an important but unnecessary characteristic of testimony.

³⁸ 131 S. Ct. 1143 (2011).

³⁹ *Id.* at 1160 (emphasis added); see also *id.* at 1166 ("[I]nformality suggests that the interrogators' *primary purpose* was simply to address what they perceived to be an ongoing emergency . . ." (emphasis added)); *Davis*, 547 U.S. at 830 ("While these [formal] features certainly strengthened the statements' testimonial aspect — made it more objectively apparent, that is, that

only Supreme Court Justice consistently to advocate placing dispositive weight on the formality of an out-of-court statement in determining whether it is testimonial.⁴⁰

That formality is not a necessary characteristic of testimony was made even clearer by Justice Alito's plurality opinion in *Williams*, which explored the common characteristics among statements deemed "testimonial" by the post-*Crawford* Court. While Justice Alito identified both purpose and formality as indicative of testimonial statements, he also recognized that in one of the post-*Crawford* cases — *Hammon v. Indiana*⁴¹ — an informal statement was nevertheless deemed testimonial because of its prosecutorial purpose.⁴² Thus, he concluded, "in *Hammon* and every other post-*Crawford* case in which the Court has found a violation of the confrontation right, the statement at issue had the primary purpose of accusing a targeted individual,"⁴³ reinforcing the notion that purpose is the relevant object of inquiry and that informality does not necessarily indicate a lack of testimonial purpose. Therefore, in *Lopez*, the better doctrinal approach would have been to treat formality as simply one indication of purpose — though certainly a very important one — and not as an independent and necessary precondition for finding an out-of-court statement to be testimonial.⁴⁴

the *purpose* of the exercise was to nail down the truth about past criminal events — none was essential to the point." (emphasis added).

⁴⁰ See, e.g., *Bryant*, 131 S. Ct. at 1167 (Thomas, J., concurring in the judgment); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring); *Davis*, 547 U.S. at 835–37 (Thomas, J., concurring in the judgment in part and dissenting in part).

⁴¹ 546 U.S. 1213 (2006). *Hammon* was decided together with *Davis*.

⁴² See *Williams v. Illinois*, 132 S. Ct. 2221, 2242–43 (2012) (plurality opinion). The statements at issue in *Hammon* were generated during a relatively informal police interrogation. Despite their lack of formality, however, the Court found the statements to be testimonial because, "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." *Davis*, 547 U.S. at 830. By contrast, the interrogation at issue in *Davis* was primarily intended "to meet an ongoing emergency." *Id.* at 828.

⁴³ *Williams*, 132 S. Ct. at 2243 (plurality opinion). While eight of the nine Justices have embraced some form of the primary-purpose approach, they do not agree on what precisely that primary purpose must be. In particular, five of the Justices in *Williams* disagreed with Justice Alito's position that testimonial statements must have "the primary purpose of accusing a targeted individual." See *id.* at 2273 (Kagan, J., dissenting) (quoting *id.* at 2243 (plurality opinion)) (internal quotation mark omitted). For the purposes of this analysis, it is sufficient to note (as did the *Lopez* court) that the Justices *do* agree that a testimonial statement's purpose must "pertain[] in some fashion to a criminal prosecution," *Lopez*, 286 P.3d at 477, as distinguished, for example, from police interrogations that have the primary purpose of meeting an ongoing emergency, business records that have the primary purpose of administering an entity's affairs, or inculpatory statements of criminal accomplices that have the primary purpose of furthering a criminal conspiracy. See *Melendez-Diaz*, 129 S. Ct. at 2539–40; *Crawford v. Washington*, 541 U.S. 36, 56 (2004).

⁴⁴ Concededly, Justice Corrigan, whose concurrence in *Lopez* also managed to garner a majority of the justices' support, would have "ground[ed] the analysis in the primary purpose prong" of the majority's test. *Lopez*, 286 P.3d at 481 (Corrigan, J., concurring). However, the three justices who joined in Justice Corrigan's concurrence also joined in the majority opinion, indicating that,

In addition to comporting more closely with the Supreme Court's Confrontation Clause jurisprudence, treating formality as just one indication of purpose would avoid the "curious results" that can occur when dispositive weight is placed on formality.⁴⁵ For example, after the majority's holding in *Lopez*, lower courts may admit lab reports prepared by out-of-court analysts based solely on perfunctory, "for lab use only" disclaimers, or because those analysts simply marked their initials next to their notations, as opposed to signing "formalized" laboratory certificates.⁴⁶ As Justice Kagan recognized in her *Williams* dissent, law-enforcement agents could easily create such arbitrary signs of informality that have no logical connection to the primary purpose of the underlying report, "grant[ing] constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protections."⁴⁷ Furthermore, by treating formality as a necessary characteristic of testimony, the *Lopez* holding creates the perverse consequence of allowing only the least formal out-of-court forensic statements to come into court, which adds the additional threat of undermining the reliability of admissible hearsay evidence.⁴⁸

while they would have preferred to ground their testimony analysis in the primary-purpose prong of the majority's test, they still considered formality to be a necessary and independent requirement for invoking the Confrontation Clause's protections.

⁴⁵ Roger C. Park, *Is Confrontation the Bottom Line?*, 19 REGENT U. L. REV. 459, 461 (2007) (arguing that the justification for looking to a statement's formality "fits better with an approach that considers formality only as evidence of the declarant's intent, and not as an independent requirement").

⁴⁶ See Richard D. Friedman, *Three Decisions from the California Supreme Court on Forensic Reports*, CONFRONTATION BLOG (Oct. 15, 2012, 5:37 PM), <http://confrontationright.blogspot.com/2012/10/three-decisions-from-california-supreme.html> ("[T]wo quick reactions [to *Lopez*]: (1) The majority engages in a fine-tuned analysis of the placement of signatures and notations that I think utterly loses sight of the fundamental right at stake (2) The decision, if it stands, provides a recipe for avoiding the confrontation right with respect to forensic reports, something that many labs and prosecutors have been eager to accomplish").

⁴⁷ *Williams*, 132 S. Ct. at 2276 (Kagan, J., dissenting); see also Friedman, *supra* note 5, at 267-69. See generally Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475 (2006); Robert P. Mosteller, *Softening the Formality and Formalism of the "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 429 (2007). It bears mentioning that Justice Thomas has repeatedly insisted that, under his formality-based approach, the Confrontation Clause would still "reach[] bad-faith attempts to evade the formalized process." *Williams*, 132 S. Ct. at 2261 (Thomas, J., concurring in the judgment). Not only has the rest of the Court refused to adopt this position, but it has also repeatedly pointed out that "Justice Thomas provides scant guidance on how to conduct this novel inquiry into motive." *Id.* at 2276 n.7 (Kagan, J., dissenting); see also *Davis*, 547 U.S. at 830 n.5 (2006) ("It is hard to see this as much more 'predictable' than the rule we adopt for the narrow situations we address." (citation omitted) (quoting *id.* at 838 (Thomas, J., concurring in the judgment in part and dissenting in part))).

⁴⁸ See *Williams*, 132 S. Ct. at 2276 (Kagan, J., dissenting) (arguing that placing dispositive weight on formality would "make [admissible statements] less reliable — and so turn the Confrontation Clause upside down"); Coleman & Rothstein, *supra* note 9, at 531 ("[T]here is something perverse about saying sworn statements (which presumably have some guarantee of reliability) are more suspect than unsworn statements.").

By comparison, a comprehensive primary-purpose approach would better vindicate the concerns underlying the Confrontation Clause itself.⁴⁹ As the *Crawford* Court recognized in its decision to overturn *Roberts*, the Confrontation Clause is a procedural guarantee that assesses the reliability of testimony through “the crucible of cross-examination.”⁵⁰ If that guarantee is to have any meaning, then it surely must reach out-of-court statements that are “obvious substitute[s] for live testimony.”⁵¹ And in determining whether an out-of-court statement qualifies as such a substitute, it is the statement’s purpose, not its formality, that bears on the constitutional right at stake. From the perspective of the criminal defendant, an informal disclaimer should not lead to the admission of a report that is clearly designed to establish past events at trial any more than an analyst’s formal signature should lead to the exclusion of ordinary business records.⁵²

By explicitly finding formality to be a necessary component of testimony, the *Lopez* court was attempting to distill a complex constitutional doctrine into a workable two-part inquiry. But the end result is a conjunctive test with negative implications for the confrontation rights of criminal defendants — a statement may be deemed non-testimonial for lack of formality *or* for lack of requisite purpose, but not until both qualities are present will the Confrontation Clause’s protections attach. Such a narrow reading of a defendant’s constitutional rights would be more credible if it had a stronger doctrinal and analytical footing.

⁴⁹ In dissent, Justice Liu chose to focus on the formality of a statement’s *process*, rather than on the formality of its form, touching on many of the concerns raised in this analysis. See *Lopez*, 286 P.3d at 483 (Liu, J., dissenting) (“[T]he level of formality of a statement, while relevant, does not exhaust the proper analysis . . .”). That being said, Justice Liu expressly endorsed “a two-part definition of testimonial hearsay,” *id.* at 483, and analyzed formality and purpose separately in his opinion. Furthermore, Justice Liu never explained the precise relationship between formality and purpose, arguing that *Lopez*’s test was both sufficiently formal *and* had the requisite purpose to merit exclusion under the Confrontation Clause. For the reasons discussed in this analysis, a doctrinally and analytically preferable approach would clearly articulate that formality is just one consideration in determining the overall purpose of an out-of-court statement.

⁵⁰ *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

⁵¹ *Davis*, 547 U.S. at 830.

⁵² The constitutional need to test the reliability of out-of-court statements through the “crucible of cross-examination” is no less when forensic evidence is involved, regardless of whether an individual laboratory analyst has an obvious incentive to fabricate test results. See, e.g., *Williams*, 132 S. Ct. at 2272 (Kagan, J., dissenting). As evidence of this fact, consider the recent crime-lab scandal in Massachusetts, in which the actions of an uncertified “rogue chemist” have called into question the reliability of forensic evidence used in over 34,000 criminal prosecutions. See *Behind Boston Crime Lab Chemist’s Alleged Deceptions*, CBS NEWS (Dec. 14, 2012, 8:26 AM), http://www.cbsnews.com/8301-505263_162-57559175/behind-boston-crime-lab-chemists-alleged-deceptions.